BANK BUMIPUTRA MALAYSIA BHD

v.

KUCHING PLAZA SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[SUIT NO: KG 221 OF 1988]
22 JUNE 1998

BANKING: *Securities for advances - Guarantee - Letter of Guarantee - Terms and conditions - Liability of borrower and guarantor - Interest rate - Interest rate varied and increased - Whether variation within terms of guarantee - Whether increase thereof illegal - Extension of time granted to borrower - Whether had discharged the guarantor*

The plaintiff, Bank Bumiputra Malaysia Berhad, sued the first defendant, Kuching Plaza Sdn Bhd ('the borrower') and the other defendants ('the guarantors') for a sum of RM1,602,983.83 being money lent to the borrower and which the guarantors guaranteed repayment. In their defence the guarantors argued *inter alia* that the Letter of Guarantee was invalid as it had not sufficiently described the plaintiff. The primary issues that arose were (1) whether the plaintiff had improperly imposed a 1% commitment fee on the loan (2) whether the plaintiff had uniterally varied the interest rate thereof, and if so whether such variation had discharged the guarantors (3) whether the increased interest was illegal; and (4) whether indulgence in the form of an extension of time granted to the borrower had discharged the guarantors.

Held:

[1] It was a matter of evidence rather than inferences to be drawn from the terms used in letters, whether the 1% commitment fee was imposed. Since the defendants asserted that the 1% was imposed, they had to prove it. On the evidence the defendants had failed to prove such assertion.

[2] The contention that the Letter of Guarantee had not properly inserted the name of its beneficiary (*ie*, the plaintiff's name) cannot be sustained. The facts showed that the Letter of Guarantee bore the name of the plaintiff in big print, and it could not be anything but to identify the plaintiff as being the beneficiary of the guarantee.

[3] Based on the phrase 'at 2½% above our prime rate' it was clear that the rate of interest was to be calculated from time to time. Since the prime rate changed from time to time there was no merit in the argument that the borrower and the plaintiff had not agreed on a variable interest rate.

There was therefore no variation in the agreement between the plaintiff and the borrower resulting in the increase in the rate of interest, but that the increase was within the said provision of the original agreement.

[4] Since the action was based upon a Letter of Guarantee and not upon a charge, such increase in the interest rate was not governed by the Sarawak Land Code and therefore not illegal.

[5] Although an indulgence in the form of an extension had been given to the borrower (despite the fact that no provision had been made for the same) without the consent of the guarantors, this did not mean that the guarantors had been discharged.

[Judgment for plaintiff.]

Case(s) referred to:
Bateman v. Phillips [1803-13] All ER Rep 132 ***(dist)***
Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors [1991] 2 MLJ 202 ***(foll)***
Burnes v. Trades Credits Ltd [1981] 2 All ER 122 ***(refd)***
Lee Phek Choo v. Ang Guan Yau & Anor [1975] 2 MLJ 146 ***(foll)***
Malayan Banking Bhd v. Yap Seng Kee & Ors [1988] 1 MLJ 313 ***(foll)***
Tay Guan Ho v. Chin Huat Hin Co [1987] 2 MLJ 704 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 86
Evidence Act 1950, s. 106
Land Code (Sarawak), ss. 112, 146(1)(b)
Rules of the High Court 1980, O. 24 r. 7

Other source(s) referred to:
Halsbury's Laws, 4th edn, vol 20, para 164

For the plaintiff - Idris Abdullah; M/s Idris & Co
For the 1st, 2nd, 3rd, 7th & 8th defendants - Lee Chuan Eng; M/s Ee & Lim

Reported by Mariette Peters-Goh

JUDGMENT

Ian HC Chin J:

Introduction

Bank Bumiputra Malaysia Berhad ("the plaintiff") took out the writ herein on 26 September 1988 suing Kuching Plaza Sdn. Bhd. ("the borrower") and Leonard Linggi Jugah, Mathew Chan Theng Kiang, Sim Kheng Lung and Wong Yik Ka ("the guarantors") (and against two others as well which this trial is not concerned with) for the sum of RM1,602,983.83 being money lent

to the borrower and which the guarantors guaranteed repayment. The trial commenced on 18 May 1998. Mr. Idris Abdullah, learned counsel for the plaintiff, closed the plaintiff's case on the same day and this was followed by the closing speech of Mr. Lee Chuan Eng, learned counsel for the borrower and guarantors, on 19 May without calling any evidence while Mr. Idris replied on 20 May. At my request both learned counsel addressed me further on 25 May on which date I adjourned for consideration of the judgment. I will now set out the evidence adduced for the plaintiff.

Evidence For The Plaintiff

Lokman Bin Hasan ("Lokman") testified that he was at the relevant time employed by the plaintiff in its Kuching branch. He said he issued the letter of offer dated 24 July 1979 to the borrower. I will reproduce here cl. 6 of the letter of offer which governs the interest rate and which was subject of argument, *viz.*:

BANK BUMIPUTRA MALAYSIA BERHAD
[Etc…]

24th July, 1979.

Messrs. Kuching Plaza Sdn. Bhd.
[Etc…]

Re: Application For Banking Facilities
… – Bridging Finance : M$5.0 Million
– End-Finance : M$6.0 Million

We are pleased to inform that your above applications has been approved subject to the following terms and conditions:-
...

6) **Interest:**
a) **Bridging Finance**

At 2 ½ % above our Prime Rate (currently at 7 ½ % per annum) i.e. for a total of 10% per annum.

b) **End-Finance**
At 10% per annum.

Lokman said he sent this document together with the letter of guarantee which the guarantors later signed. This letter of guarantee is also the subject of another issue in this case. I would also reproduce here the part of the document which was called for interpretation, namely the preamble and cl. 3, *viz.*:

BANK BUMIPUTRA MALAYSIA BERHAD
LETTER OF GUARANTEE

To

In consideration of your having agreed to advance credit facilities to KUCHING PLAZA SDN. BHD. (hereinafter called "the Borrower") up to the sum of MALAYSIAN RINGGIT FIVE MILLION ONLY ($5,000,000.00) for principal only (hereinafter referred to as "the Principal Sum") with interest thereon at the rate of 2 ½ % ABOVE PRIME RATE* (%) per annum I/WE LEONARD LINGGI JUGAH, MATHEW CHAN THENG KIANG, JAMES LEE SZE YORK, WONG YUK JING (f), SHUM SIEW KEONG, SIM KHENG LUNG and WONG YIK KA (hereinafter called "the Guarantor/s") HEREBY AGREE with and Guarantee you as follows:-

…

Without Prejudice To Any Other Rights

3. This Guarantee shall be without prejudice to and shall not be affected nor shall I/WE (or any of us) be released or exonerated by any of the matters following:-

(i) Any securities negotiable or otherwise including other guarantees which you may now or any time hereafter hold from the Customer or any other persons in respect of any money hereby guaranteed.

(ii) The variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment specialty or other security or instrument negotiable or otherwise and whether satisfied by payment or not.

(iii) Your refusal at any time or times and at your absolute discretion to give further advances or overdrafts to the Borrower whether with or without notice to us.

(iv) Any time given or extended to the Borrower and/or any other security instruments guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the Borrower and/or any other person or persons whether with or without consent or notice to us.

It will be noticed that at the place after the word "to", the name of the beneficiary of the letter of guarantee was supposed to be inserted but was not. Lokman explained that it was an omission on their part and that it was intended to be inserted at that place the name of the plaintiff, Kuching branch. Apart from this security for the overdraft, a charge over certain property was also executed where cl. 7 of that charge says:

7. Subject to the provision of Clause 8 hereof the interest on any principal money for the time being owing including capitalised interest shall at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the rate aforesaid and all the covenants and conditions contained in or implied by these presents and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

Ramli bin Taib is another bank officer who testified for the plaintiff and he said that notwithstanding the letter of the plaintiff to the borrower dated 19 December 1981, the 1% commitment fee mentioned in the letter was not levied against the borrower. He explained that it was not done because there was no un-utilised overdraft. Since this letter (and another dated 29 May 1985) is relied on by the defence, it is re reproduced here, *viz*.:

BANK BUMIPUTRA MALAYSIA BERHAD

Date: December 19, 1981

To: Kuching Plaza Sdn. Bhd.
1st Floor, OCBC Building
Khoo Hun Yeang Street
Kuching

Dear Sir,

Re Imposition of Commitment Fee on [Un-utilized] Overdraft Facilities on Your Current Account No. 2388

The Association of Banks in Malaysia at its Council Meeting held on 3rd September 1981 has decided that member Banks are to impose a 1% commitment fee on unutilised Overdraft balances of their customers. This is in line with the expressed policy of the Central Bank of Malaysia to reduce substantial portion of unutilised Overdraft facilities with the Commercial Banks.

In line with the above decision, we are to advise you that with effect from **1st February 1982** a commitment fee of 1% shall be imposed on unutilised portion of your Overdraft facility with us.

[Etc...]

This is the convenient place to turn to the first of the issues.

Whether The 1% Commitment Fee Was Imposed

It was the defendants' assertion in their defence that such was imposed but the plaintiff had in their reply denied it and the said Ramli bin Taib also denied the same in his testimony. Mr. Lee contended that it must have been imposed because the 19 December letter said so and the said letter does not appear to be a general letter sent to all customers. Furthermore, added Mr. Lee, there was a subsequent letter from the plaintiff to the borrower dated 29 May 1985 which suggests that there was still un-utilised overdraft and hence the likelihood that the 1% fee was imposed. The relevant part of this May 29 letter reads:

> Re: Overdraft Facility under
> A/A No. OD/FL/MC/G/79/164
> For $5.0 million (expired)
> Account No. 017-02388-38
>
> Your letter dated 11th April, 1985 pertaining to the above refers.
>
> We are pleased to inform that our Bank has agreed to extend your overdraft facility to 31st January, 1986 within a drawing limit of $1.3 million provided all the rental proceeds on the shoplots leased out are to be assigned or paid into your above-mentioned account with us every month so as to activate it.
>
> Consequently, the interest rate chargeable on the overdraft balance has been revised to 14.75% per annum i.e. 3 1/2 % above our Base Lending Rate which is 11.25% per annum at present.
>
> Meanwhile, we would be very grateful if you could submit a valuation report on the existing security charged to us at its present status.
>
> [Etc...]

This letter, I am of the view, speaks of the extension of the due date for repayment to 31 January 1986 but with the condition that the overdraft must not exceed RM1.3 million. It does not speak of the granting of additional facility. Therefore, this letter does not support the contention that there was still un-utilised facility upon which the 1% commitment was levied. If by employing the term "general" Mr. Lee meant to argue that the letter is not a general but a specific one to inform the borrower that the 1% fee had already been incurred and will be imposed, such contention is not sustainable since, in the first place, there is no mention at all of the amount of the unutilised amount and, secondly, it talked of the imposition on a future date. It is a matter of evidence, rather than inferences to be drawn from the terms used in letters, whether the 1% was imposed. The books of accounts would show that. In this regard, Mr. Lee now complains that the plaintiff did not disclose the documents of accounts in their possession and that the witnesses merely

adverted to them being kept in a certain place and that, accordingly, an adverse inference should be drawn against the plaintiff. In this regard, Mr. Lee argued that though the defence made the assertion that the 1% was imposed, nevertheless, because the books of accounts, which would, according to learned counsel show the imposition of the 1%, were kept by the plaintiff which the plaintiff did not disclose, the burden has shifted to the plaintiff to prove that the overdraft was fully utilised, relying on s. 106 of the Evidence Act 1950. Section 106 says:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

I will deal first with the question of the non-production of the documents of accounts. In my view, it is rather late in the day to complain of the non-production or non-disclosure of the documents of accounts. If any party to a suit is of the view that the other has not fully disclosed the documents in its possession, then the list of documents should be assailed by an application to the court under O. 24 r. 7 of the Rules of the High Court 1980 for an order that the offending party makes a further affidavit regarding the documents. Because this was not done, the documents alleged by the defence to support their case that the 1% was imposed were not produced. In any event the guarantors could easily have subpoenaed the officers of the plaintiff to produce the documents they desired to establish their defence but they did not do so. It is the assertion of the defence that the 1% was imposed and it is trite law that the defence must establish it. None of the evidence, the said letters included, can support the defence case that the 1% was imposed. As for reliance on s. 106 of the Evidence Act 1950, the witnesses in this case had already said that the 1% was not imposed and I, therefore, fail to see how the non-existence of something, that is the absence of the imposition of the 1%, can be said to be a fact within the special knowledge of the plaintiff. Furthermore, the borrower must be in possession of the statements of accounts from which can be deduced whether the 1% was imposed or not and therefore, such is within the knowledge of the borrower. That being the case, the knowledge being common to at least the plaintiff and the borrower if not also to the guarantors who were directors of the borrower, it cannot be said to be a fact "especially within the knowledge" of the plaintiff so as to require the plaintiff to prove it. Therefore, s. 106 is of no assistance to the defendants' case. I turn now to the second issue.

Whether The Guarantors Executed The Letter Of Guarantee

Mr. Lee argued that because the name of the plaintiff was not inserted in the letter of guarantee in the place after the word "to" (which I have earlier mentioned) the plaintiff was not named or sufficiently described. It, contended learned counsel, failed to satisfy the requirements of the Statute of Frauds and is invalid. For this proposition of law Mr. Lee relied firstly on *Halsbury's Laws*, 4th edn, vol. 20, para. 164 which reads:

> Description of parties. In order to satisfy the Statute of Frauds[1], all the contracting parties must be named or sufficiently described as such in writing[2]. It is sufficient that their names are mentioned merely as descriptive of the subject matter of the contract[3]. The memorandum need not, however, be addressed to the other contracting party[4].
>
> A mere misdescription, whether it be of one of the parties or of the principal debtor, will not render a guarantee unenforceable[5].

The other authority relied on is *Lee Phek Choo v. Ang Guan Yau & Anor* [1975] 2 MLJ 146 FC which held that the Statute of Frauds applies to Sarawak which case I am bound to follow notwithstanding the reservation expressed in *Tay Guan Ho v. Chin Huat Hin Co.* [1987] 2 MLJ 704 SC as to the correctness of that decision.

As for the question of the plaintiff not being "named or sufficiently described", Mr. Idris replied that there is oral testimony to say that it was an omission and that the Kuching branch of the plaintiff was the intended beneficiary of the letter of guarantee. What in effect the testimony amounted to is that the word "you" (to which identity the guarantors was contracting with) in the letter of guarantee was intended to refer to the plaintiff's Kuching branch. That reply calls for a consideration of the law concerning the admissibility of such evidence to establish the identity of the intended beneficiary of a letter of guarantee. Mr. Lee, to his credit, had brought to the attention of the court the case of *Bateman v. Phillips* [1803-13] All ER Rep 132 which allows oral evidence to establish the fact that the guarantee was intended for a principal though it was addressed to the name of his attorney and it was held that the guarantee satisfied the Statute of Frauds. However, in that case, the letter of contract was addressed to someone which is not so in the present case. That case is of no assistance to the plaintiff. Under the Statute of Frauds, the name of the beneficiary must be evident from the memorandum constituting the guarantee. Therefore, oral evidence will not be allowed contrary to the argument of Mr. Idris. However, I agree with Mr. Idris that since the letter of guarantee bears the name of the plaintiff in big print, it cannot be anything but to identify the plaintiff as being the beneficiary of the guarantee. Therefore, I am of the view that the Statute of Frauds had been satisfied. I turn now to the next issue.

Whether A Variation In The Interest Rate Discharged The Guarantors

Interest was charged on the loan at diverse rates without the knowledge and consent of the guarantors and this, according to Mr. Lee, discharged the guarantors as provided by s. 86 of the Contracts Act 1950. That section provides for the discharge of a surety where any variance is made without the consent of the surety in the terms of the contract between the principal debtor and the creditor as regards the transactions subsequent to the variance. Learned counsel also contended that cl. 3 of the letter of guarantee does not cover the variation of interest or the imposition of penalty interest.

This issue turns first on the question of what was the interest rate that was agreed to be chargeable. This turns upon cl. 6 of the letter of offer which I have already set out earlier. In this regard, Mr. Lee said:

> Paragraph 6(a) of the Letters of Offer states in relation to interest on bridging finance "At 2½ % above Prime Rate (currently at 7 ½ % per annum) i.e. for a total of 10% per annum". The aforesaid provision is a straight forward statement of the rate of interest chargeable at 10% per annum. The word 'currently' to layman would mean "now prevailing" or "at this point of time" and cannot be stretched to mean that the Plaintiff is by the said word licensed to [vary] the agreed rate of interest subsequently without [additional] words which clearly empower the Plaintiff to do so. Such words were in fact used by the Plaintiff at Paragraph 1(ii) of the Letter of Guarantee which provides the following: "… or at such other rate as may be determined by the Bank from time to time." If therefore the intention of the Plaintiff was to allow for the variation of the rate of interest it could have added the additional words as found in Paragraph 1(ii) of the Letter of Guarantee to leave the matter without doubt. The absence of such clear words must surely leave no doubt that the intention of the parties thereto was to fix the rate of interest for the bridging finance at 10% per annum.

Learned counsel then referred to *Burnes v. Trades Credits Ltd* [1981] 2 All ER 122 PC. That case concerns a guarantee for the repayment of 100,000 pounds at 9% interest repayable in October 1975. The guarantee provides for (1) "any further advances" to be included in the guarantee unless the guarantors gave written notice to the contrary and (2) that the mortgagee was entitled to grant the mortgagor time or 'any other indulgence or consideration' without obtaining the guarantors' consent. The mortgage when it fell due for payment was varied by having it extended for a year and with the interest rate increased to 16%. The guarantors were not asked and they did not consent to the variation. After the mortgagors defaulted, a claim was made against the guarantors for unpaid interest. The Privy Council held that the term "further advances" meant the furnishing or lending of an additional principal sum and did not include an extension of time for payment for repayment of the original

principal sum advanced. It was also held that the increase in the interest rate was not a liability which the terms of the guarantee required the guarantors to undertake without their consent and that it cannot be said to be an indulgence or consideration shown by the mortgagee to the mortgagor which the mortgagee was entitled to do but it did not enable the mortgagee and the mortgagor by agreement between themselves to impose an additional liability on the guarantors without their consent.

I will deal first with the contention regarding the interest rate agreed between the plaintiff and the borrower which Mr. Lee argued was a fixed rate of 10%. In my view the words – "At 2½ % above our prime Rate (currently at 7½ % per annum) *ie*, for a total of 10% per annum" – spell out a formula in which the rate of interest is to be calculated from time to time. A fixed rate was not intended since "prime rate" was used and the prime rate, it is a notorious fact, changes from time to time and that it was envisaged by the parties that the prime rate should change from time to time can be gathered by the use of the term "currently at 7½% per annum" and need not necessarily be so in future. Therefore, there is no merit in the argument that the borrower and the plaintiff had not agreed on a variable interest rate. This means that since the argument of Mr. Lee was premised on an unacceptable construction of the said terms, his contention must necessarily fail.

As for *Burnes v. Trades Credits Ltd*, it is of no assistance to the guarantors since I am of the view that there was no variation in the agreement between the plaintiff and the borrower resulting in any increase in the rate of interest but that the increase was within the said provision of the original agreement.

Whether The Increased Interest Was Illegal

Mr. Lee then submitted that s. 146(1)(b) of the Sarawak Land Code requires every variation in the interest rate to be supported by a memorandum of increase which has to be registered under the code. He further contended that "any action pursuant to the provisions of a charged relating to an increased rate of interest on which no memorandum has been executed and registered in accordance with s. 112 and 146 of the Land Code would be contrary to the provisions of the said code and hence unlawful and unsupportable." The present action is based upon a letter of guarantee and not upon a charge and therefore there is also no substance in the contention of learned counsel. Mr. Lee then contended that indulgence was granted to the borrower which discharged the guarantors which is the next issue I will turn to.

Whether Indulgence Granted To Borrower Discharged The Guarantors

Mr. Lee contended that the terms of the letter of offer adverted to an agreement for a bridging loan for two years only with no provision for extension and since the same had been extended without the consent of the guarantors it had discharged the guarantors, relying again on *Burnes v. Trades Credits Ltd.* Mr. Idris replied, and I am in agreement with learned counsel, that the terms of the letter of guarantee are entirely different from that of *Burnes v. Trades Credits Ltd*. and that case therefore cannot be relied on by the guarantors. Since the words in the letter of guarantee had been the subject of various judicial decisions, the court should follow the interpretation given to those words. Therefore, I would respectfully follow the decisions in *Malayan Banking Bhd v. Yap Seng Kee & Ors* [1988] 1 MLJ 313 and *Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202 which held that a clause similar to cl. 3(iv) of the letter of guarantee, *supra,* made it clear that an extension of time does not discharge the guarantors.

In so far as the argument relating to penalty interest is concerned, I have earlier said that the interest rate is variable at the instance of the plaintiff whatever name that interest may be called and such variation is within the agreement made between the borrower and the plaintiff. This takes me to the final issue in this case.

Whether Interest Could Be Compounded

It is not in issue that the plaintiff had compounded the interest. The guarantors contended that the terms of the letter of offer only provided for simple interest at 10% per annum for bridging-finance while compound interest (being the same as "capitalised interest", the term used in relation to the interest for end-financing) was expressly stated for end-financing. I have already concluded that the interest is variable and not at a fixed rate of 10% per annum. The unanswered question is whether the letter of offer provides for the interest for the bridging loan to be compounded. Mr. Lee had submitted that the charge, which provides for compound interest to be chargeable for the bridging loan, cannot be relied on as it was executed by the borrower after the guarantors had executed the letter of guarantee. But that contention is adequately met with the reply of Mr. Idris that the charge has been expressly incorporated in the letter of offer as to make the terms of the charge part of the agreement between the borrower and the plaintiff. A term of the charge expressly provides for the interest to be compounded.

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Conclusion

In the premises, judgment is entered for the plaintiff against the guarantors, that is Leonard Linggi Jugah, Mathew Chan Theng Kiang, Sim Kheng Lung and Wong Yik Ka, for the sum of RM1,602,983.83 together with interest at 13.25% per annum from 1 May 1987 until full payment. Costs to the plaintiff.

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